IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02/04/2004

CORAM

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

W.P.No.7565 of 1996
and W.P.No. 8204 of 2000

P. Dhanapakkiam ... Petitioner

-Vs-

1.The Secretary
Holy Angel High School
Madurai (R3 in WP.8204/00)

2.The Joint Director of
School Education
(Secondary Education)
College Road
Madras (R1 in WP.8204/00)

3.The Chief Educational Officer
Madurai (R2 in WP.8204/00) ... Respondents

Prayer:

In W.P.No.7565/1996 :: Petition filed under Article 226 of
the Constitution of India praying for a writ of mandamus directing the first
respondent to issue order permitting the petitioner to join duty with effect
from 16-08-1995 and to pay the petitioner's salary for the period from
16-08-1995 till the date permitting the petitioner to join duty.

In W.P.No.8204/2000 :: Petition filed under Article 226 of
the Constitution of India praying for a writ of certiorari calling for the
records relating to the orders in Na.Ka.No.139273/G6/96 dated 12-04-200 0 of
the Joint Director of School Education(Secondary Education) the first
respondent herein.

!For petitioner :: Mr. K.M. Vijayan, Senior Counsel
for Mr. D. Arokiasamy

^For respondents:: Mr. K. Chandru, Senior Counsel
for Mr. S. Kadarkarai

Mr. S.P.Prabhakaran,Addl.G.P.
for Government
Mr. V. Sanjeevi
for R1 in W.P.7565/96
for R3 in W.P.8204/00

:O R D E R

The petitioner was appointed as Headmistress in the third respondent-School. On 15-06-1995, she was placed under suspension contemplating enquiry. On 22-06-1995, she obtained ex parte injunction in O.S. NO.528 of 1995 on the file of the Additional District Munsif, Madurai. On 24-07-1995, the injunction was vacated. But, since, the Secretary of the School Committee did not proceed against the petitioner, because of the pendency of the injunction, the enquiry could not be contemplated within two months. On 04-08-1995, the Secretary applied to the second respondent, the Chief Educational Officer for approval, for extension of suspension beyond two months. On 11-09-1995, the Chief Educational Officer refused to grant approval. On 14-09-1995, an appeal was filed to the first respondent. On 18-11-1995, the enquiry was commenced after framing charges. On 02-01-1996, the petitioner submitted her explanation. On 19-02-1996, the appeal filed against the order of refusing to grant approval to keep the petitioner under suspension was dismissed. On 01-04-1996, the respondent applied to the Chief Educational Officer for prior approval for terminating the service of the writ petition. On 23-07-1996, the respondent filed W.P. No.10661 of 1996 for a writ of mandamus to the Chief Educational Officer for accord of prior approval to dismiss the petitioner. On 31-07-1 996, notice was ordered to the petitioner. The petitioner had filed W.P.No.7565 of 1996 for a mandamus to permit her to join duty on the ground that the suspension could not extend beyond six months. Notice of motion was ordered. The interim application for direction to reinstate the petitioner was dismissed. On 12-03-1996, the Chief Educational Officer directed the respondent to follow the procedure under Rule 17(3)(1) of the Tamil Nadu Recognized Private Schools (O) Rules 1974 and to pay salary and allowance to the Headmistress for two months. The Chief Educational Officer referred to the proceedings of the Joint Director of school education. On 17-04-1996, the Chief Educational Officer also informed the respondent that action would be initiated against the respondent if the petitioner is not reinstated. Thereupon, the respondent filed W.P.No.13293 of 1996 for a mandamus to quash the order of the Chief Educational Officer. Interim injunction was granted in the above writ petition on condition that the salary is deposited. On 18-11-1996, the Chief Educational Officer refused to give approval for the termination. An appeal was filed before the Joint Director. On 12-04-2000, the Joint Director allowed the appeal. Against that, W.P.No.8204 of 2000 was filed. Meanwhile, the respondent had filed O.S.No.147 of 1997 for a declaration that the respondent is a minority institution. This was decreed. Against that A.S.No.43 of 2000 was filed and that was dismissed on 24-11-2000. Pending the writ petition the services of the petitioner were terminated.

2. The learned Senior counsel appearing for the petitioner would submit that the appellate authority had not heard the petitioner before

passing the order and therefore, the matter should be remitted to the appellate authority for consideration in accordance with law. The learned Senior Counsel appearing for the petitioner would submit that the decree granted in the suit would not take away the right that had accrued in favour of the petitioner by virtue of the respondent originally invoking the provisions of the Act and the operation of the decree would only have its effect prospectively and not retrospectively.

3. The learned senior counsel appearing for the respondent, on the other hand, would submit that the respondent is a minority institution. It was further submitted that by the decree minority character was not granted, it merely declared the character as it was. The Act does not apply and therefore, the respondent need not obtain the approval of the authorities for termination of the Headmistress and therefore, the writ petitions have to be dismissed. According to the learned Senior Counsel appearing for the respondent any remedy which the petitioner has, is in challenging the order of termination. The respondent cannot be asked to comply with the provisions of the Act by going again before the Appellate Authority.

4. In the counter filed in this writ petition several allegations are made regarding the petitioner and the petitioner's husband's interference in the smooth running of the School.

5. The Tamil Nadu Recognized Private Schools Regulation Act (hereinafter referred to as 'the Act')defines 'minority school' as a private school of its choice established and administered by any minority whether based on religion or language as has the right to do so under clause (1) of Article 30 of the Constitution. The term 'Private School' is defined separately. Section 2(3)(a) defines 'educational agency' vis-a-vis a minority school and section 2(3)(b) vis-a-vis other private schools. Chapter IV which deals with school committee and its constitution and functions and it is specifically stated that for the purpose of this Chapter 'private school' includes a 'minority school'. Chapter V deals with terms and conditions of service of teachers and other persons employed in private schools. In this chapter, there is no similar provision or explanation. In Chapter VI, which deals with control of private schools, Section 36 provides that notwithstanding anything contained in this chapter, the Government shall not take over the management of any minority school under Section 34. Therefore, it would appear that Chapter V does not apply to minority schools. In fact, in the Writ Petition No.4478 of 1974 dated 17-12-19 75, the Division Bench declared that, sections 8(1)(a), 11(1)(b), 12(1) and 14 to 18, 21(2) to 26, 31 to 33 and 39(4) and 41 to 45 and Rules 7, 9 except clauses (e) and (k) of Sub-rule 2, Rules 10 to 14, 16 to 18 and 22 to 25 did not apply to minority institutions.

6. In Association of University Teachers Vs. State of Tamil Nadu (1 990 Writ L.R. Supp. 51(DB)), it was held, the application of Sections 20 to 22 of the Tamil Nadu Private Colleges Regulation Act to a minority college will constitute interference with the internal management but that implementation of Section 19(3)(a) and (b) will not constitute any inroad into fundamental rights under Article 30.

7. Rajah V.V. Seetharamayya Bahadur Vs. The Asst. Commissioner, U. L.T.(1998 L.W. 896) was relied on by the learned Senior Counsel for the writ petitioner in which it was held that the introduction of Section 7-A in the Tamil Nadu Urban Land Tax Act will not enable the department to reopen an assessment for a period where no appeal had been filed and that the operation of amendment introducing Section 7-A is not retrospective. According to the learned Senior Counsel, this principle would apply to the present case and the fact that a declaratory decree had been obtained in a Civil Court would not take away the right that had accrued to the petitioner.

8. P. Tulsi das Vs. Govt. of A.P. (2003 I SCC 364)was also relied on in which the Supreme Court upheld the validity of Section 29 of Andhra Pradesh Educational Service Untrained Teachers (Regulation of Services and Fixation of Pay) Act, 1991 (14 of 1991) by writing them down so as to be operative only prospectively without infringing the rights already acquired irrespective of whether the beneficiary had approached Courts or not. In that case, orders were passed whereby the teachers had obtained orders enabling them to get payments in the scale of pay attached to the post of school assistants in spite of the fact that some of them were appointed against the post of SSLC trained teachers only. This decision became final since there was no challenge to it. At this stage, the Government became alive, to the possible heavy financial commitments and serious implications flowing from the various judgments considered to be detrimental to the public interest and promulgated the Ordinance which was replaced by the Act. The Supreme Court held that the rights, benefits and perquisites acquired by the teacher cannot be said to be acquired otherwise than in accordance with law and cannot be nullified "at the sweet will and pleasure of the Government, with impunity".

9. The learned Senior Counsel also referred to Y. Theclamma Vs. Union of India (AIR 1987 SC 1210) wherein it was held that a minority institution must seek prior permission of educational officer before suspending the teacher and such requirement will not infringe Article 3 0(1) of the Constitution of India.

"One should have thought that in a case like the present where the management charged the petitioner with diversion of funds and communicated the impugned order of suspension pending departmental inquiry to the Director, there would be some response from him. The management did not formally apply for his prior approval in terms of sub-s. (4) of S.8 of the Act in view of the declaration by the High Court that it being a linguistic minority educational institution, it was protected under Art.30(1) and no prior approval of the Director was required. Nevertheless, it took the precaution of communicating the impugned order of suspension to the Director. Presumably, the Director refrained from passing any order according or refusing approval having regard to the judgment of the High Court. In view of the recent decision in Frank Anthony Public School's case (AIR 1987 SC 311), it must be held that the institution was governed by sub-s. (4) of S.8 of the Act and therefore, there was a duty cast on the Director to come to a decision whether such immediate suspension was necessary by reason of the gross misconduct of the petitioner as required by sub-s (5) of S.8. We refrain from expressing any opinion as to the seriousness or otherwise of the charge as

that is a matter to be enquired into by a departmental proceeding. The fact however remains that there was no response from the Director within a period of 15 days as envisaged by the second proviso to S.8(4). As a result of this, the impugned order of suspension has lapsed and it is so declared. Although the impugned order of suspension has lapsed, the management may yet move the Director for his prior approval under sub-s. (4) of S.8 of the Delhi School Education Act, 1973, and the Director shall deal with such application, if made, in accordance with the principles laid down in Frank Anthony Public School's case."

10. While acknowledging the State's power to regulate the affairs of the minority educational institutions, the Supreme Court said in Board of Secondary Education and Teachers Training Vs. Jt. Director of Public Instructions, Sagar (1998 (8) SCC 555) that, "in that process the right of management cannot be taken away, even if the Government is giving hundred per cent grant." In Ahmed abad St. Xavier's College Society Vs. State of Gujarai (1974 (1) SCC 717) the Supreme Court held, "It is doubtful whether the right under Article 30(1) can be bartered away or surrendered by any voluntary act or that it can be waived."

11. N. Ammad Vs. Manager, Emjay High School and others (1998 VI SCC 674), was referred to in A.S.No.43 of 2000, the appeal against the decree. The question was whether the Management of a minority school was free to choose and appoint a qualified person as the Headmaster of the school and whether the Management is hedged by any legislative edict or executive fiat in doing so. The School sought to appoint the fourth respondent before the Supreme Court as Headmaster. This was resisted by the appellant, who was the senior-most teacher. The District Educational Officer intervened on his behalf but in vain. Therefore, the appellant filed a writ petition to appoint him as a Headmaster. The writ petition was dismissed. The disappointed Senior teacher went upto the Supreme Court seeking special leave to appeal. In that case, Government Order had declared the school as a muslim minority community school on 02-08-1994. It was contended on behalf of the appellant that the school could not claim any protection as a minority school before that date. Before the Supreme Court it was accepted that there is no provision in the Act which enables the Government to declare the School as a minority school. Therefore, the school is a minority school even if the Government declares it as such or not. The declaration by the Government is at best only a recognition of an existing fact.
"When the Government declared the school as a minority school it has recognised a factual position that the School was established and is being administered by a minority community. The declaration is only an open acceptance of a legal character which should necessarily have existed antecedent to such declaration. Therefore, we are unable to agree with the contention that the school can claim protection only after the Government had declared it as a minority school on 02-08-1994."

This reasoning squarely applicable to the case on hand.

12. Ofcourse, in this case, the declaration comes from the Civil Court. The petitioner complained that she was not a party to the suit.

The declaration of the minority character of the institution is against the whole world and is not against an individual. It is the declaration of the school's character. The State had lost in appeal. The learned Government Pleader would submit that an appeal has been filed but the Government Pleader is unable to give the number or whether any stay has been obtained. So it is not as if the respondentschool became a minority school only on 1999, the date of the decree. The decree of the Civil Court only declared its character.

13. The petitioner herein was the Headmistress of the school.
In Paragraph 18 of 1998 VI SCC 674(cited supra) the importance of a Headmaster has been stressed and it states that the Headmaster is the key-post of the running of the School. The Supreme Court referred to a Full Bench judgment of the Kerala High Court in Aldo Maria Patroni V. E.C. Kesavan (1964 Ker LT 791 : AIR 1965 Ker 75) and it runs as follows:
"19. How important is the post of Headmaster of a school has been pithily stated by a Full Bench of the Kerala High Court in Aldo Maria Patroni V. E.C. Kesavan. Chief Justice M.S. Menon has, in a style which is inimitable, stated thus:
"The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school, and we must hold that the imposition of any trammel thereon - except to the extent of prescribing the requisite qualifications and experience - cannot but be considered as a violation of the right guaranteed by Article 30 91) of the Constitution. To hold otherwise will be to make the right `a teasing illusion, a promise of unreality."
In that case, it was held that,
"the right to choose the Headmaster is perhaps the most important facet of the right to administer school and we must hold that the imposition of any trammel thereon - except to the extent of prescribing the requisite qualifications and experience - cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution."

14. The Supreme Court also referred to Manager Corporate E. Agency V. State of Kerala (1990 (2) Ker LT 240), wherein it was held that,
"When once the pivotal position of the Headmaster is recognised, it has to be held that the right to appoint a person of its choice as Headmaster is of paramount importance to the minority, any interference with which (otherwise than by prescribing qualifications and experience) will denude the right of administration of its content, reducing it to mere husk, without the grain."
And finally, it held,
"Thus the management's right to choose a qualified person as the Headmaster of the School is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid article

and would hence be void."
It would therefore follow that the right of the minority institution to remove the petitioner/Headmistress and to appoint another is also protected by Article 30(1).

15. AIR 1987 SC 1210, the Theclamma's case, which was relied on behalf of the petitioner is really not applicable to the order of termination because that relates to suspension and even in that case, as extracted above, the Supreme Court had commented about the seriousness of the charges.

16. In T.M.A.Pai Foundation Vs. State of Karnataka (2002 8 SCC 481), eleven questions were framed with regard to minority institution and question 5(c) deals with the appointment of staff, employees, teachers and principals including their service conditions and it was observed that in the matter of day to day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be an external controlling agency.
"However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge."
Therefore, this judgment also indicates that a separate mechanism will have to be evolved to redress the grievances of employees of both aided and unaided minority institution. It is not in dispute that the respondent institution is an aided institution.

17. The objection, that a right that had accrued in favour of the petitioner cannot be taken away, must fail; since no right has accrued to the petitioner as on date. It is true that the Chief Educational Officer did not agree to give approval for the dismissal. But this order was set aside by the Appellate Authority who also clearly observed that,
"the rejection of the approval would be subject to the result of the writ petitions pending before this Court viz., these writ petitions."

18. Pending the writ petition, the writ petitioner prayed for stay of the operation of the impugned order dated 12-04-2000. While arguing the application for vacating the stay it was contended on behalf of the respondent that since the third respondent is a minority institution, the entire proceedings had been rendered unnecessary. Since only the miscellaneous petitions were argued, this Court did not go into that aspect. It was also submitted before this Court at that time that the petitioner had subsequently been dismissed on 29-04-2001, with retrospective effect; the prayer for extension of stay was not granted since the writ petitioner had already been dismissed and while disposing of the stay petition it was observed that,
"it is made clear that it is open to the petitioner to take appropriate application for modification and also to challenge the order of

dismissal."
This has also not been done by the petitioner. The order of dismissal has not been challenged.

19. It is true that the order of dismissal seems to indicate that it is giving effect to the appellate authority's order. Be that as it may, the order of dismissal cannot be ignored. The grievance of the petitioner that while disposing of the appeal the appellate authority has not given any opportunity to the petitioner appears to be correct. She has not been heard. It is true that the respondent school had itself sought for the approval of the Chief Educational Officer. But that will not in any way take away their rights, which they claim under Article 30(1) of the Constitution of India, since this right is absolute and cannot be bartered away or waived. If the matter is remitted it will take away the freedom that the fourth respondent enjoy under Article 30(1) of the Constitution of India. It has been held that unlike Article 19(1) of the Constitution of India, the fundamental freedom under Article 30(1) of the Constitution of India is absolute in terms and is not subject to any reasonable restriction of the nature the fundamental freedoms enunciated in Article 19 of the Constitution of India. The pivotal role that a Headmaster or a Headmistress plays has already been referred to. So if the respondent's right to remove the Headmaster/ Headmistress and appoint a Headmaster/ Headmistress of its choice is denied then it would nullify the protection given by Article 30(1) of the Constitution of India. So both questions raised by the petitioner, whether the decree operates retrospectively and whether an appellate order passed without hearing one of the parties can be allowed to stand, are answered in favour of the respondent-School.

20. The questions whether the enquiry was just and proper and if not, whether this Court cannot test the validity of the enquiry to uphold the individual rights as against the minority rights were not raised nor argued.

21. For the above reasons, Both the writ petitions are dismissed. No costs.

Index: Yes
Internet: Yes

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To
1. The Joint Director of
School Education
(Secondary Education)
College Road
Madras

2. The Chief Educational Officer
Madurai